No. 82-1462

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1982

DAVID L. HERBST,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

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QUESTION PRESENTED

1. Whether petitioner was denied effective assistance of counsel in violation of rights secured to him by the Sixth and Fourteenth Amendments of the United States Constitution when petitioner's trial counsel questioned him before the jury with respect to conviction of a crime and introduced evidence with respect thereto knowing that such questioning and introduction of evidence was prohibited under Wisconsin law.

2. Whether the conduct of petitioner's trial counsel in failing to seek an advance determination from the trial judge with respect to the admissibility of prior conviction evidence because of his fear of offending the judge was the result of incompetence or without a basis in reason.

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No.

In The

Supreme Court of the United States

October Term, 1982

DAVID L. HERBST,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

The petitioner, David L. Herbst, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Court of Appeals, District III, entered in this proceeding on October 19, 1982.

OPINION BELOW

The opinion of the Wisconsin Court of Appeals, District III, not reported upon recommendation of the Court, appears in the appendix hereto.

JURISDICTION

The judgment of conviction was rendered by the Circuit Court of Marinette County on August 5, 1980, convicting petitioner, upon a jury verdict, of 18 counts of medicaid fraud contrary to Wisconsin statutes.

On September 30, 1980, petitioner was sentenced to serve one year in jail, with work release privileges, and was fined $18,000.

On October 19, 1982, the Wisconsin Court of Appeals, District III, affirmed the judgment and orders of the trial court.

On December 23, 1982, the Wisconsin Supreme Court denied a petition to review the adverse decision of the Court of Appeals.

This petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is believed to be invoked under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments of the United States Constitution are involved herein, the pertinent portions of which are set forth in the appendix.

Also involved is Wis. Stat. 906.09(3) relating to impeachment by evidence of crime which provides that:

> No questions inquiring with respect to conviction of a crime, nor introduction of evidence

with respect thereto shall be permitted until the judge determines pursuant to 901.04 whether the evidence shall be excluded. (See appendix)

STATEMENT OF THE CASE

The petitioner is a Doctor of Dental Surgery, licensed to practice dentistry in the State of Wisconsin.[1] He graduated from the Marquette University Dental School in 1973, and following service in the United States Navy, began the practice of dentistry in Milwaukee and Marinette, Wisconsin. He became an eligible provider under the State of Wisconsin Medical Assistance Program.

As a result of an investigation by the Medicaid Fraud Central Unit of the Wisconsin Justice Department, Dr. Herbst was charged with 16 counts of medical assistance fraud alleging that he had not performed services and 4 counts alleging that he performed unnecessary services, all of which he billed to the Medical Assistance Program. Nine patients were involved and the total dollar amount involved was $743.15.

Trial counsel planned a defense based upon the fact that Dr. Herbst actually performed the services billed to the medical program but because of the complex maze of paper work required to be completed by the Program, he inadvertently billed the services in the name of the wrong patients.

In preparation for this defense, trial counsel interviewed the patients on whom the services were actually performed and had them available as witnesses to testify on behalf of Dr. Herbst.

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1. Based solely on the fact of this criminal conviction, the State of Wisconsin revoked petitioner's license to practice dentistry in the State of Wisconsin.

However, during the State's case, trial counsel decided not to present any evidence through the testimony of the actual patients to support this defense theory but elected to rely solely on the credibility of Dr. Herbst's testimony.

At the close of the State's case and prior to the defendant's case, counsel for the State announced to the court outside the presence of the jury that he had been advised that Dr. Herbst was going to testify on his own behalf and that he believed that Dr. Herbst's trial counsel was going to examine him on direct concerning prior convictions. The State's counsel requested permission to inquire into the nature of the crimes, arguing that the nature of the crimes was relevant on the issue of intent. The court refused to permit this inquiry.

A few minutes before Dr. Herbst took the witness stand, his trial counsel told him that he had made a "small error in the law" when he earlier had advised Dr. Herbst to plead guilty to two misdemeanors because he had thought only evidence of felony convictions were admissible for impeachment purposes; that he was going to ask him on direct examination whether he had ever been convicted of a crime and that he should answer exactly: "Yes, one time - two crimes."

Dr. Herbst was then called as the first witness for the defense by his trial counsel. At the outset of the questioning on direct examination, trial counsel asked him if he had ever been convicted of a crime, to which he answered "yes". Counsel then asked him how many times and he answered "one time - two crimes". Counsel then proceeded to his direct line of questioning.

Counsel for the State referred repeatedly in his final argument to Dr. Herbst's lack of credibility and his untruthfulness. He directly called to the attention of the jury the fact that the court would be reading to them an instruction concerning conviction

of a crime "not one crime but two crimes" and credibility. He requested that they listen carefully to that instruction.

The court instructed the jury that they were entitled to consider the prior convictions in weighing Dr. Herbst's testimony and determining his credibility.

The jury found Dr. Herbst guilty of 18 of the 20 counts.

Timely notice of appeal was filed with the Wisconsin Court of Appeals, District III. On April 27, 1981, appellate counsel for petitioner moved the court for an order remanding the matter for an evidentiary hearing as required by *State v. Machner,* 92 Wis. 2d 797, 285 N.W. 2d 905 (1979) and *State v. Simmons,* 57 Wis. 2d 285, 203 N.W. 2d 887 (1973) on the issue of effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

On May 7, 1981, the Court of Appeals entered an order on its own motion, for good cause shown, permitting voluntary dismissal of the appeal and extending the time for filing a motion for postconviction relief. On May 15, 1981, petitioner filed a motion for postconviction relief seeking a new trial on the constitutional grounds that petitioner was denied effective assistance of counsel.

At the evidentiary hearing, trial counsel testified that he knew that Dr. Herbst had been previously convicted of a crime and was vulnerable to being impeached if he testified on his own behalf. Trial counsel testified that he was fully aware of Wis. Stat. 906.09(3) which prevents the suggestion of inadmissible prior conviction evidence to the jury. Trial counsel testified that he was also fully aware that he had never requested that the trial judge make a determination outside the presence of the jury as to whether the evidence should be excluded. The reason trial

counsel gave for not producing the witnesses that he had planned to call was because he thought they would not make a good impression. The reason trial court gave for never requesting a determination on the issue relating to the exclusion of the conviction evidence was that he did not want to offend or anger the judge.

Two expert witnesses testified that in their opinion, this representation by trial counsel was not equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services.

REASONS FOR GRANTING THE WRIT

No procedural standards exist in the State Courts of Wisconsin which permit a meaningful evidentiary hearing for the purpose of determining whether a criminal defendant was denied effective assistance of counsel.

Petitioner has the burden of proving by clear and convincing evidence that his trial counsel's conduct was the result of incompetence, or was without a basis in reason.

Petitioner has filed exhaustive briefs with appropriate authorities on the constitutional issues involved in this case with both the trial court and the Court of Appeals. Notwithstanding, the trial court failed to recognize its own responsibility to preserve petitioner's due process and fair trial rights and summarily denied all postconviction relief based upon a failure of proof. The Court of Appeals likewise failed to recognize the importance of petitioner's right to a fair trial and merely adopted the findings of the trial court.

The legal controversy of significance here is demonstrated by the fact that the reviewing courts in the State of Wisconsin

have never reversed a criminal conviction based upon a denial of effective assistance of counsel.

The Court of Appeals here approved a procedure to remand the issue of ineffective assistance of counsel to the trial court for an evidentiary hearing to allow trial counsel an opportunity to explain his conduct at trial so that the Court of Appeals could determine whether or not his conduct was the result of incompetence or deliberate trial strategy. However, the Court of Appeals failed to independently consider all the evidence adduced at the postconviction hearing from the viewpoint of the petitioner and the protection of his rights to a fair trial but instead, considered the issues from the viewpoint of protecting the reputation of trial counsel by justifying his conduct in retrospect. This is made clear by the court's statement that "In ruling on the postconviction motion, the trial court confirmed the attorney's impression that the motion to exclude evidence of the prior convictions would not have been granted."

The ruling of the trial court confirming trial counsel's conduct after the fact does not erase the prejudice that was created in the minds of the jurors that convicted Dr. Herbst, nor does it cure the gross constitutional error committed by his trial counsel.

The only way for the court to remedy the wrong to petitioner was for the court to grant a new trial and rule on the admissibility of the conviction evidence in advance so that trial counsel may properly prepare and present the defense evidence accordingly.

The failure of the Court of Appeals to independently review all the evidence adduced at the postconviction hearing for the protection of petitioner's rights rather than trial counsel's reputation is further demonstrated by the court's statement that "Herbst must show that his counsel's representation did not meet

the standards set out in *State v. Harper* (cite). There is no such showing."

Trial counsel testified that the reason for his conduct was that he did not want to offend or anger the judge. Two expert witnesses testified at the hearing and they both agreed that in their professional legal opinion, this reasoning was not sound trial strategy, but the result of incompetence and below the standard set in *Harper*. None the less, the Court of Appeals concluded that the trial court's finding was not against the great weight and clear preponderance of the evidence.

Aside from the obvious error and the gross miscarriage of justice here, the problem appears to have been created by the procedure prescribed by the Court of Appeals itself in ordering the evidentiary hearing to be conducted in the form of a motion for postconviction relief and allowing the trial judge to make findings. The trial judge in this case had the ultimate responsibility of preventing any question inquiring with respect to conviction of a crime or introduction of evidence with respect thereto until he first determined outside the presence of the jury whether the evidence should be excluded. The trial court was clearly in error for permitting the questions and the introduction of the evidence and as such could not be impartial in ruling on who was responsible for the error.

In summary this Court should continue in its development of the law as it relates to Sixth Amendment effective assistance of counsel rights and force state courts to eliminate vague and arbitrary procedural standards for conducting evidentiary hearings in such cases. Failure to act will allow at least the State of Wisconsin to continue with a practice which in effect is a total grant of immunity to incompetent attorneys at the expense of the rights of the criminally accused.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ALBERT H. BEAVER
Attorney for Petitioner

APPENDIX

OPINION OF THE WISCONSIN COURT OF APPEALS FOR THE THIRD DISTRICT

Office of the Clerk

SUPREME COURT
STATE OF WISCONSIN

To

Hon. William Donovan
Circuit Court of Marinette County
Br. 2, Marinette County Courthouse
Marinette, WI 54143

Tim Duket
District Attorney
Marinette County Courthouse
Marinette, WI 54143

Madison, December 23, 1982

Albert H. Beaver
118 N. Lawton Place
Sturgeon Bay, WI 54235-3499

Michael J. Losse
Asst. Attorney General

The Court today announced an order in your case as follows:

No. 81-2442-CR *State v. David L. Herbst*

Opinion

The court having considered the defendant-appellant's (David L. Herbst) petition for review from the adverse decision of district III of the court of appeals filed October 19, 1982:

IT IS ORDERED, the petition is denied. No costs.

MARILYN L. GRAVES
Clerk of Supreme Court

Opinion

No. 81-2441-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. HERBST,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Marinette County: WILLIAM E. DONOVAN, Judge.

Affirmed:

Before Foley, P.J., Dean and Cane, JJ.

PER CURIAM. The sole issue on appeal is whether David Herbst was denied effective assistance of counsel on the ground that his counsel questioned him regarding prior convictions without first seeking a ruling on whether the trial court would allow instruction of those convictions. The trial court found that Herbst had effective counsel and it denied his postconviction motions. Because we conclude that the trial court's finding is not against the great weight and clear preponderance of the evidence, we affirm.

Opinion

Herbst was asked by his counsel on direct examination whether he had been convicted of a crime and how many times. Trial counsel explained that he believed the evidence would be admitted and, based upon this impression, thought it was preferrable to have his client testify to the convictions himself on direct examination. In ruling on the postconviction motions, the trial court confirmed the attorney's impression that the motion to exclude evidence of the prior convictions would not have been granted. The other convictions were closely related in time and in substance to the crimes charged in this case. They bore directly on Herbst's credibility. While in the exercise of caution, an attorney might have confirmed his impression by seeking a ruling from the court; an attorney is not ineffective if he fails to make a motion that would have and should have been denied.

Upon our examination of the entire record, we agree with the trial court that counsel did an admirable job during this lengthy and complex trial. Counsel spent a great number of hours preparing for trial and was diligent and frequently successful in representing Herbst at trial. Any error in relying upon his correct impression that the court would deny the motion, rather than testing the issue by making the motion, is inconsequential in light of counsel's performance during the entire trial. *See generally State v. Schill,* 93 Wis.2d 361, 381, 286 N.W.2d 836, 845-46 (1980). Herbst must show that his counsel's representation did not meet the standards set out in *State v. Harper,* 57 Wis.2d 543, 557, 205 N.W.2d 1, 9 (1973). There is no such showing. The trial court's finding that Herbst had effective counsel is not against the great weight and clear preponderance of the evidence.

By the Court. --Judgment and orders affirmed.

Inclusion in the official reports is not recommended.

Opinion

APPENDIX

1. *State v. Nye*, 100 Wis.2d 398, 410, 302 N.W.2d 83, 89 (Ct. App. 1981) *aff'd per curiam*, 105 Wis.2d 63, 312 N.W.2d 826 (1981).

RELEVANT CONSTITUTIONAL PROVISIONS

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Article VI.

In all criminal prosecutions, the accused shall. . . .and to have the Assistance of Counsel for his defense.

Article XIV.

. . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

906.09 Impeachment by evidence of conviction of crime. (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible. The party cross-examining him is not concluded by his answer.

(2) EXCLUSION. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) ADMISSIBILITY OF CONVICTION. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded. . . .

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STATE OF WISCONSIN,
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ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

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No. 82-1462

IN THE

SUPREME COURT OF THE UNITED STATES

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DAVID L. HERBST,
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v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for the following reasons. This case involves merely the application of well-settled principles of law to the particular facts of the case. No federal question exists. The principles of law utilized by the state courts are in harmony with decisions of this Court and federal courts of appeals. The decision of the state court did not deny the petitioner any constitutional right. The petitioner has distorted the facts of the case in an effort to induce this Court to grant a writ of certiorari.

ARGUMENT

The sole issue in this case is whether the petitioner was denied his sixth amendment right to assistance of counsel and thus his fourteenth amendment right to due process of law.

The test for effective assistance of counsel under Wisconsin law is that it be "equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). This test was adopted to replace the less stringent "sham and mockery" test. *State v. Harper*, 57 Wis. 2d at 552, 557.

The "ordinarily prudent lawyer" standard is in harmony with the standard employed by this Court and the federal courts of appeals. This Court has stated that the effectiveness of a defendant's counsel depends "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Tollett v. Henderson*, 411 U.S. 258, 268 (1973).

Since *McMann*, the federal courts of appeals in at least ten circuits have replaced the "sham and mockery" standard with various formulations of the "range of competence" test. *See Dyer v. Crisp*, 613 F.2d 275 (10th Cir.), *cert. den.*, 445 U.S. 945 (1980). These formulations have been stated as: "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate" in the District of Columbia; "reasonably competent assistance" in the First Circuit; "the customary skill and knowledge which normally prevails at the time and place" in the Third Circuit; "representation ... within the range of competence demanded of attorneys in criminal cases"

in the Fourth Circuit; "reasonably likely to render and rendering reasonably effective assistance" in the Fifth and Sixth Circuits; the "expected professional standards and ... customary skills and diligence of a reasonably competent attorney" in the Seventh and Eighth Circuits; "reasonably competent and effective representation" in the Ninth Circuit; "the skill, judgment and diligence of a reasonably competent defense attorney" in the Tenth Circuit. *Dyer v. Crisp,* 613 F.2d at 276-278 (citations omitted). These formulations are the functional equivalent of the Wisconsin standard. Thus the petitioner cannot claim that there is a question of federal law that needs to be decided or conflict of law that needs to be resolved.

The petitioner is in error when he claims that his right to the effective assistance of counsel was denied. The petitioner's sole basis for so claiming is the alleged failure of trial counsel to avail himself of a statutory limitation on impeachment by evidence of criminal conviction.[1] The petitioner's attorney elicited from him on direct examination the fact that he had been convicted of two crimes.[2] Although sec. 906.09, Wis. Stats. (R-Ap-102), requires a judicial determination that the probative value of evidence of a criminal conviction outweigh any unfair prejudice, there is ample authority for the proposition that the statute applies only to cross-examination. *See* Judicial Council Committee's Note, Handbook Wisconsin Rules of Evidence, 59 Wis. 2d. Rp., page R177; 63 Op. Att'y Gen. 424 (1974); *Underwood v. Strasser,* 48 Wis. 2d 568, 571, 180 N.W.2d 631 (1970); *Nicholas v. State,* 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971). Moreover, although the record in this case is not at all times a model of clarity, a review of same shows that a judicial determination of admissibility was made.[3]

[1]Amended motion seeking postconviction relief, 10-1-81, p. 1

[2]Trial transcript, pp. 676-679.

[3]Trial transcript, pp. 666-669, corrected trial transcript p. 2; postconviction motion transcript, 9-21-81, pp. 76-82; trial court

Even if any statutory requirement of a judicial determination of admissibility was not met, the petitioner cannot claim that he was denied the effective assistance of counsel. The sixth amendment does not require error free representation. *Dyer v. Crisp,* 613 F.2d at 278; *McMann v. Richardson,* 397 U.S. at 770-771, 90 S.Ct. at 1448-1449; *Roe v. State,* 95 Wis. 2d 226, 236, 290 N.W.2d 291 (1980); *State v. Nye,*100 Wis. 2d 398, 302 N.W.2d 83 (Ct. App.), *aff'd per curiam,* 105 Wis. 2d 63, 312 N.W.2d 826 (1981). A comparison of the facts in this case with those in other cases where an appeal based upon alleged ineffectiveness of counsel was denied, shows that petitioner's attorney's representation was well within the range of competence demanded by federal courts and the state court alike. *See Washington v. Watkins,* 655 F.2d 1346 (5th Cir. 1981); *Leroux v. State,* 58 Wis. 2d 671, 207 N.W.2d 589 (1973); *Dean v. Israel,* 516 F.Supp. 477, 492 (E.D. Wis. 1981); *United States v. Fleming,* 594 F.2d 598, 607 (7th Cir. 1979); *United States ex rel.Ortiz v. Sielaff,* 542 F.2d 377, 380 (7th Cir. 1976); *United Statesv. Murzyn,* 631 F.2d 525, 533-534 (7th Cir. 1980); *United States ex rel. Williams v. Twomey,* 510 F.2d 634 (7th Cir. 1975).

The petitioner's attack on the Wisconsin courts' procedure for dealing with allegations of ineffective assistance of counsel is a make-weight argument to create a federal question where there is none. Before appealing on the grounds of incompetence of trial counsel, a postconviction hearing must be held in the trial court wherein trial counsel testifies as to his or her actions and the reasons therefor. *State v. Machner,* 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The trial court found that the petitioner's trial counsel's representation met the requisite standard of

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decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

competence.[4] This decision entailed weighing the credibility of trial counsel against that of the petitioner, who also testified at the postconviction hearing, on issues where their testimony was contradictory.[5]

The trial court's decision also entailed weighing the credibility of the expert witnesses called by each side.[6] Contrary to the assertion in the petition for certiorari, one of the experts testified that trial counsel's representation met the standard for competence.[7] The witness could only have testified consistent with the petitioner's position if he assumed facts that he believed to be untrue.[8] The expert witness testifying for the petitioner had not even read the entire transcript of the trial.[9] The trial court found the expert testifying for the state to be more credible.[10]

The court of appeals affirmed the trial court's decision.[11] A trial court's findings of fact will not be overruled unless contrary to the great weight and clear preponderance of the evidence. *See State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983); *State v. Nye*, 100 Wis. 2d 398, 410, 302 N.W.2d 83 (Ct. App.), *aff'd per*

[4]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-101, 104.

[5]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

[6]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

[7]Postconviction motion transcript, 10-30-81, p. 50.

[8]Postconviction motion transcript, 10-30-81, pp. 50-82.

[9]Postconviction motion transcript, 10-30-81, p. 29.

[10]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

[11]*State v. Herbst*, No. 81-2441-CR, filed 10-19-82, p. 1, Petitioner's Appendix 3a.

curiam, 105 Wis. 2d 63, 312 N.W.2d 826 (1981).' Nevertheless, the court of appeals independently reviewed the record and concluded that the petitioner had been competently represented at trial.[12] The procedure utilized to determine allegations of incompetence of trial counsel is more than adequate to protect the sixth amendment rights of criminal defendants.

From this sequence of events, the petitioner somehow concludes that this Court must rescue the sixth amendment from the Wisconsin courts. Deference to the "good sense and discretion of the trial courts" in regards to assuring competent criminal defense has found approval in the decisions of this Court. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The petitioner's assertion that Wisconsin appellate courts have never granted relief for incompetence of counsel is patently false. *See State v. Felton,* 110 Wis. 2d 485, 329 N.W.2d 161 (1983).

The words of the Wisconsin Supreme Court aptly expose the petitioner's attempt to concoct a federal question: "Criminal ... cases cannot be retried at the instance of the loser because he is more hopeful of success on a second try." *Cross v. State,* 45 Wis. 2d 593, 605, 173 N.W.2d 58; (1970).

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[12] *State v. Herbst,* No. 81-2441-CR, filed 10-19-82, pp. 2-3.

CONCLUSION

For the reasons discussed above, the State of Wisconsin, respondent, respectfully asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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STATE OF WISCONSIN

CIRCUIT COURT

BRANCH II

MARINETTE COUNTY

Case No. 79-CR-317

DECISION ON AMENDED
MOTION SEEKING
POSTCONVICTION RELIEF

STATE OF WISCONSIN,
Plaintiff,

-vs-

DAVID L. HERBST,
Defendant.

The defendant has filed a motion for an order vacating his judgment of conviction and has requested a new trial for the reason that he was denied effective assistance of counsel in violation of rights secured to him by the Sixth and Fourteenth Amendments of the United States Constitution. This Court denies that motion.

In his brief the defendant concedes that some aspects of trial counsel's representation were excellent. The defendant's claim of ineffective representation centers around the fact that trial counsel brought out the fact of defendant's two prior convictions on direct examination of the defendant without first getting a determination by the Court on the record of whether the fact of his convictions would be admissible.

The Wisconsin Statute governing the admissibility of the evidence of a conviction of a crime for impeachment purposes reads as follows:

"906.09 Impeachment by evidence of conviction of crime.

(1) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible. The party cross-examining him is not concluded by his answer.

"(2) Exclusion. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) Admissibility of conviction. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to Sec. 901.04 whether the evidence shall be excluded."

Attorney Lyons testified at the hearing on this motion that he did not believe for one minute that this trial court, or any other Wisconsin court would not allow the fact of the prior convictions to be admitted for impeachment purposes. He regarded an attempt to have the fact of the convictions suppressed as a futile effort which might anger the judge and distract from the real issue of whether the plaintiff could go into the circumstances surrounding the two prior convictions. There is nothing in the record which indicates that assessment of the situation was incorrect.

The question of whether the plaintiff would be allowed to go beyond eliciting the fact of the convictions and the number on convictions was a close one. The State moved the court for permission to inquire

into the nature of those crimes, specifically the name of the statute violated. The plaintiff's trial counsel indicated that it would probably take at least a day of testimony to prove up the connection. This court held that unless the nature of the prior convictions was gone into in detail, inquiring into the name of the specific statute would be of no probative value. This court held to allow the plaintiff to go into detail would involve a lot of time on what could become a side issue, and in view of the added emphasis unduly prejudice the defendant. This court implicitly held that the fact of the convictions could be admitted in its ruling.

The defendant testified that Attorney Lyons had told him prior to the day that he began testifying that the evidence of his convictions could not be used to impeach his testimony. The defendant testified that when he was about to testify at the trial Attorney Lyons told him that he had made a mistake and that he would have to testify as to his convictions. This court does not accept that testimony.

In his reply memorandum the defendant also claims that it was ineffective representation for his trial counsel to rely so heavily on the defendant's testimony if counsel knew that his credibility could be impeached by prior convictions. This criticism appears to be in the nature of Monday morning quarterbacking. In view of the state of the defendant's records, it would appear all but impossible to defend against the charges without the defendant testifying as to his intent at the time claims for reimbursement were made.

The plaintiff and the defendant called experts to testify on this motion. Their opinion differed on whether the defendant had been adequately represented. This court agrees with the opinion of Attorney Gerald Boyle.

The defendant failed to meet his burden of proving that his counsel's representation did not meet the standard set out in *State -v- Harper,* 57 Wis. 2d 543 (1973). This court finds that Attorney Kevin Lyons' trial representation was equal to that which the ordinarily prudent lawyer, skilled or versed in criminal law would give to his client. The defendant's motion for a new trial must be denied.

Dated November 23, 1981

/s/ William M. Donovan

William M. Donovan
Circuit Judge Branch II